

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 19-12359-jlg

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5 In the Matter of:

6

7 3175-77 VILLA AVENUE HOUSING DEVELOPMENT FUND CORP

8

9 Debtor.

10 - - - - - x

11 United States Bankruptcy Court

12 One Bowling Green

13 New York, NY 10004

14

15 January 29, 2021

16 5:05 PM

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21 B E F O R E :

22 HON JAMES L. GARRITY, JR.

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 HEARING re 1) Case Conference

2 (Doc #11)

3

4 Status Report Filed by Charles A Higgs on behalf of 3175-77

5 Villa Avenue Housing Development Fund Corporation

6 (Doc #39)

7

8 Status

9 (Doc #72)

10

11 continued from 10/3/2019

12 continued from 1/16/2020

13 continued from 1/28/2020

14 adj from 2/19/2020

15 adj from 3/10/2020

16 adj from 3/25/2020

17 adj from 5/14/2020

18 adj from 7/8/2020

19 adj from 8/12/2020

20 adj from 9/3/2020

21 adj from 10/28/2020

22 adj from 12/8/2020

23 continued from 1/ 2 1 /2021

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1 HEARING re 2) Motion for Reargument FRCP 59 and FRCP 60
2 (Doc #43)

3

4 Opposition The City of New York's Opposition to Debtor's
5 Motion for Reconsideration of the Court's Lift Stay Order
6 (Doc #45)

7

8 adj from 3/10/2020

9 adj from 3/25/2020

10 adj from 5/14/2020

11 adj from 7/8/2020

12 adj from 8/12/2020

13 adj from 9/3/2020

14 adj from 10/28/2020

15 adj from 12/8/2020

16 continued from 1 /21 /21

17 adj from 1/28/2021

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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1 P R O C E E D I N G S

2 P R O C E E D I N G S

3 THE COURT: All right. Good afternoon. This is
4 Judge Garrity. The matter we have on the --

5 MS. CACUCI: Good afternoon Your Honor.

6 THE COURT: Good afternoon. The matter we have on
7 is the 3175-77 Villa Avenue Housing Development Fund
8 Corporation, Case Number 19-12359. In particular, this is
9 the continued hearing on the request that the Court
10 reconsider -- excuse me -- reconsider and order that it
11 enter in connection with a motion for stay relief.

12 I've had an opportunity to review the motion, the
13 response, the reply, and the letter, and that the city sent
14 last week or maybe earlier this week. I can't remember. In
15 any event, I consider all those matters -- I've reviewed all
16 of those matters and consider them all to be part of the
17 record of this hearing. And I'm now going to make a ruling
18 on the request.

19 3175-77 Villa Avenue Development Fund Corporation
20 is the Debtor and is a housing development fund corporation
21 organized under Article 11 of the Private Housing Finance
22 Law exclusively for the purpose of developing a housing
23 project for low-income individuals. Its sole asset is a
24 five-story building consisting of 51 affordable housing
25 rental units for income-qualified individuals. I'll refer

1 to that as "the Property."

2 The Debtor took ownership of the Property on or
3 about April 15, 1993 when the New York City, which I'll
4 refer to as "the City," transferred the Property to the
5 Debtor by deed dated August 15, 1993, pursuant to the
6 provisions of Section 576 of the Private Housing Finance
7 Law.

8 On June 7, 2015, the City commenced an in-rem
9 foreclosure action against multiple properties in the Bronx,
10 including the Property. In that foreclosure action, the
11 City sought to foreclose tax liens against the Property
12 arising as a result of the Debtor's delinquent real estate
13 taxes and other charges dating back to 2000 and totaling
14 just under \$1.6 million.

15 On December 1st, 2017, a default judgment of
16 foreclosure dated November 16, 2017 was entered against the
17 Debtor -- that's the Judgment of Foreclosure -- after the
18 Debtor failed to appear in the foreclosure action. After
19 the four-month period within which the Debtor had the right
20 to redeem the Property expired, the City sought to transfer
21 the property from the Debtor to a third-party as part of the
22 City's third-party transfer program.

23 Very briefly, the third-party transfer program is
24 intended to remedy the problem of tax-delinquent distressed
25 residential properties in New York City. The policy and

1 goal of the legislation is to encourage prompt payment of
2 tax arrears and, if the arrears are not paid, to quickly
3 transfer those buildings to new owners who have the
4 expertise to address the problems and complete prompt
5 rehabilitation.

6 Proposed third-party transferees under the program
7 must be qualified under criteria and processes established
8 by the New York City Department of Housing Preservation and
9 Development, or the HPD. The HPD selects new owners or
10 developers through a "request for qualifications" process.
11 The proposed new owners must demonstrate that they have,
12 among other things, qualifications, experience in management
13 and rehabilitation of occupied residential property,
14 financial ability, and the capability of carrying out the
15 necessary (indiscernible).

16 Upon the transfer of the building, the tax liens
17 and charges are eliminated upon the transfer to a qualified
18 third party. Notably, owners, mortgagees, and other
19 interested parties retain the right to redeem properties
20 only during the first four months after final judgment of
21 foreclosure is entered. City Administrative Code Section
22 11-412.1(d).

23 However, the Administrative Code Section 11-
24 412.1(i) provides as follows:

25 "If the Commissioner of Finance does not execute

1 a deed conveying to the City or to a third party a
2 parcel of Class 1 or Class 2 real property," --
3 which is the type of property at issue here --
4 "within eight months after the entry of a final
5 judgment authorizing the award of possession of
6 such parcel pursuant to (b) of this section, the
7 Commissioner of Finance shall direct the
8 corporation counsel to prepare and cause to be
9 entered an order discontinuing the interim
10 foreclosure action as to said property, cancelling
11 the notice of pendency of such action as to said
12 property and vacating and setting aside the final
13 judgment.

14 "The entry of such an order shall restore all
15 parties including owners, mortgagees, and any and
16 all lienors, receivers, and administrators and
17 encumbrancers to the status they held immediately
18 before the final judgment was entered."

19 On August the 23rd, 2018, the Debtor moved to
20 vacate the Judgment of Foreclosure impending resolution of
21 the motion, obtained a stay of the judgment from the New
22 York State Supreme Court New York County, which I'll refer
23 to as "the Trial Court." On May 28th, 2019, the Trial Court
24 issued a decision and order denying the motion to vacate the
25 Judgment of Foreclosure. On July 9, 2019, the Trial Court

1 entered a decision and order denying the motion to vacate
2 the Judgment of Foreclosure.

3 On July 23rd, 2019, the Debtor commenced this
4 Chapter 11 case. On July 29, 2019, the Debtor filed a
5 timely notice of appeal of the Trial Court's decision and
6 order and timely perfected the appeal. On December 29,
7 2020, the Appellate Division First Department affirmed the
8 Trial Court's decision denying the Debtor's motion to vacate
9 the Judgment of Foreclosure.

10 On January 5th, 2021, the City served notice of
11 entry of the Appellate Division's decision. The Debtor
12 advises that it will seek leave to appeal that decision to
13 the New York State Court of Appeals. In its decision, the
14 Appellate Division ruled that orders of the Supreme Court,
15 of the Trial Court entered on or about May 24 and May 28,
16 2019, which denied the Appellant's motions to vacate the
17 judgments in-rem foreclosures granted by default and the
18 deeds transferring the properties, unanimously affirmed that
19 judgment without cost.

20 Briefly, the court reasoned as follows. The
21 judgments of foreclosure against the properties were duly
22 entered in the office of the county clerk after publication
23 of notices that complied with the applicable law, as well as
24 due process. The court found that, accordingly, the
25 presumption of regularity of those foreclosure proceedings

1 became conclusive four months after the entries of the
2 judgment of foreclosure. And as the Appellant did not make
3 their motion to vacate the judgments or take any actions to
4 redeem the subject properties within the four-month period,
5 the motions to vacate were time-barred.

6 In addition, the court found that there was
7 inadequate support in the record for the Appellant's claims
8 that the City engaged in misconduct in connection with the
9 foreclosures and property transfers under the City's third-
10 party transfer program. Accordingly, the appellate court
11 rejected the Appellant's claim that the City should be
12 equitably estopped from claiming that the redemption period
13 expired. The court also found that were it to consider the
14 Appellant's time-barred and unpreserved arguments, they
15 would them unavailing.

16 As I noted that on July 23, 2019, the Debtor filed
17 the petition, the voluntary petition, under Chapter 11 of
18 the Bankruptcy Code in this Court. On October 16, 2019, the
19 City filed a motion seeking any alternative, either relief
20 from the automatic stay or dismissal of the case for cause
21 including bad faith under Sections 305 and 1112(b) of the
22 Bankruptcy Code -- I'll refer to that motion as "the
23 Alternative Relief Motion."

24 In support of the stay request -- the stay relief
25 requested in the alternative-relief motion, the City argued

1 that the Property was not property of the estate under
2 Section 541(a)(1) of the Bankruptcy Code and, therefore, not
3 subject to the automatic stay because the Debtor's mandatory
4 redemption period under New York City Administrative Code
5 Section 11-412.1(d) had expired and absent a right of
6 redemption, the City -- the Debtor's contingent ownership
7 rights were insufficient to trigger the automatic stay.

8 The City also argued that even if the automatic
9 stay applied to the Debtor's interest in the property, there
10 was cause under Section 362(d)(1) to lift the stay so as to
11 allow the City to transfer the Property pursuant to the
12 third-party transfer program as the Debtor's right to redeem
13 had expired.

14 On November 29, 2020, the City -- the Debtor
15 responded to the Alternative Relief Motion. I'll refer to
16 that as "the Response." In opposing the stay relief
17 request, the Debtor contended under both the statutory
18 provisions of the New York City Administrative Code Section
19 11-412.1 and the Judgment of Foreclosure, it remains the
20 owner of the Property until the City transfers the deed of
21 the property.

22 Pursuant to Administrative Code Section 11-
23 412.1(i), it retained a contingent ownership interest in the
24 Property because if the City does not transfer the deed
25 within eight months of the entry of the Judgment of

1 Foreclosure, the Commissioner of Finance "shall direct the
2 corporation counsel to prepare and cause to be entered an
3 order discontinuing the in-rem foreclosure action as to said
4 property, cancelling any notice of pendency of such action
5 as to said property and vacating and setting aside said
6 final judgment." That's all from the Response at page 4.

7 On December 4, 2019, the Court commenced a hearing
8 on the stay relief request. At the hearing, the Court
9 continued the matter at the City's request to January 16,
10 2020 and granted leave for the city to file a reply to the
11 response and the Debtor to file a surreply for the limited
12 purpose of addressing the issue of whether the Property
13 became property of the Debtor's estate under Section 541(a)
14 of the Bankruptcy Code. The Court entered a minute order to
15 that effect.

16 On December 16, 2019, the City replied to the
17 response to the stay relief request. I'll refer to that as
18 the "Reply." In substance, the City argued that the
19 Property did not become property of the estate because under
20 New York City Administrative Code Section 11-412.1(b), the
21 Debtor's statutory period to redeem the Property had expired
22 pre-petition and the City's period to transfer the deed
23 under the Administrative Code Section 11-412.1(e) had not
24 expired pre-petition.

25 On January 2, 2020, the Debtor filed its surreply

1 in opposition to the stay relief request. The Debtor argued
2 that depending on the date that the state court's stay
3 terminated, the City's time to transfer the deed under
4 Section 11-412.1 had either already expired or the City had
5 nine days remaining to transfer the deed.

6 Additionally, the Debtor argued that if the Court
7 were to adopt the City's position that the Property is not
8 property of the estate under Section 541(a), then their time
9 to transfer the deed under the in-rem foreclosure statute
10 had long since expired and the City was under no -- and the
11 City is under an obligation to vacate the Judgment of
12 Foreclosure pursuant to Section 11-412.1(i).

13 On January 16, 2020, at the continued hearing on
14 the stay relief request, the Court determined that the
15 Debtor's contingent right under Section 11-412.1(i) to be
16 restored to full ownership of the Property should the City
17 fail to timely transfer the deed constituted estate property
18 under Section 541(a) of the Bankruptcy Code that was subject
19 to the stay. However, before ruling on the stay relief
20 request, the Court adjourned the matter to January 28, 2020
21 to permit the parties to file supplemental briefing on the
22 City's request in the stay relief motion to extend the
23 City's time to transfer the deed to 30 days after entry of
24 the order for relief from stay if such order was entered.

25 On January 22, 2020, the Debtor filed its

1 supplemental memorandum of law addressing the Section 108
2 issues raised by the City. In substance, the Debtor argued
3 that the time that the City has to transfer the deed after
4 the judgment of foreclosure is not a statute of limitations
5 period. The City's failure to timely transfer the deed will
6 not result in the City losing its tax lien, and the City
7 would not otherwise be prevented from commencing a future
8 in-rem foreclosure proceeding against the Property should
9 their time to transfer be deemed expired.

10 On January 23, the City filed a memorandum of law
11 regarding the applicability of Section 108 in this matter.
12 In substance, the City argued that the plain language of
13 Section 108(c) is not limited to statutes of limitations but
14 also to the continuous -- continuation, excuse me, of civil
15 actions such an in-rem foreclosure proceeding. The City
16 noted that in the Trial Court's May 28, 2019 decision and
17 order which was entered on July 9, 2019, which terminated
18 the state court's order and allowed the City to continue its
19 civil action in enforcing its in-rem foreclosure judgment,
20 is something to which Section 108(c) applies.

21 On January 28, 2020, the Court held its adjourned
22 hearing on the stay relief request. On the record of that
23 hearing, the Court determined that the Property was property
24 of the bankruptcy estate but also that the Debtor had
25 established cause under Section 362(d)(1) for relief from

1 the automatic stay so as to enforce its rights under the
2 Judgement of Foreclosure against the Property. The Court
3 further granted the City's request under Section 108(c) to
4 extend the time period for the City to commence the in-rem
5 foreclosure to 30 days after expiration of the automatic
6 stay.

7 On February 12, 2020, the Court entered the stay
8 relief order. To decretal paragraphs of that order are
9 relevant to this matter. In those decretal paragraphs, the
10 Court further ordered that the automatic stay be and hereby
11 is lifted and the City is hereby authorized to transfer the
12 deed of the Property to a third party and that the period
13 under non-bankruptcy law within which the City is authorized
14 to transfer the deed is hereby extended pursuant to 11
15 U.S.C. Section 108(c) to up to 30 days from the entry of an
16 order on the Court's docket. See the stay relief order at 1
17 to 2.

18 On February 25, 2020, the Debtor filed this motion
19 for reconsideration. And as I said, the parties have fully
20 briefed the matter. The motion for reconsideration invokes
21 Rules 59 and 60 of the Federal Rules of Civil Procedure and
22 the corresponding federal bankruptcy rules. They also
23 invoke -- as such, they also invoke Local Bankruptcy Rule
24 9023-1.

25 Federal Rule of Civil Procedure 660 is made

1 applicable herein pursuant to Bankruptcy Rule 9024. As
2 applicable, Rule 60(b) states that: "On notice and just
3 terms, the court may relieve a party or its legal
4 representative from a final judgment order or proceeding for
5 one mistake, inadvertent surprise, or excusable neglect.
6 See Federal Rule of Civil Procedure 60(b)(1).

7 The Second Circuit's view is that if a Court has
8 made a mistake of law or fact, it may make food sense to
9 permit the Court to correct the error and, thereby, avert
10 the need for an appeal. See *In re Old Carco, LLC*, 423 B.R.
11 40,46 (Bankr. S.D.N.Y. 2010). See also *In re 310*
12 *Associates*, 346 F.3d 31,34-35 (2d Cir. 2003), noting that
13 the Rule 60(b) is available to correct a mistake -- to a
14 court to correct the mistake of law or fact.

15 Rule 59(e) of the Federal Rules of Civil Procedure
16 applies to motions to alter or amend the judgment. Rule 59
17 is made applicable herein by Bankruptcy Rule 9023. It
18 states that except as provided in this rule and Rule 3008,
19 Rule 59 of the Federal Rules of Civil Procedure applies in
20 cases under the Code. A motion, pardon me, for a new trial
21 or to alter or amend a judgment shall be filed when a court
22 may on its own order a new trial no later than 14 days after
23 the entry of judgment. In some circumstances, Rule 8008
24 governs post-judgment motion practice after an appeal has
25 been docketed and is pending.

1 Local Bankruptcy Rule 9023-1(a) governs motions
2 for re-argument or reconsideration. It states that a motion
3 for re-argument order determining a motion must be served
4 within 14 days after the entry of the court's order
5 determining the original motion or in a case of a court
6 order resulting in a judgment within 14 days after the entry
7 of the judgment and, unless the court orders otherwise,
8 shall be made returnable within the same amount of time as
9 required for the original motion.

10 The motion shall set forth precisely the matters
11 or controlling decisions which counsel believes the court
12 has not considered. No oral argument shall be heard unless
13 the court grants the motion and specifically orders that the
14 matter be reargued orally.

15 Here, the Court entered the stay relief order on
16 February 12, 2020. The Debtor filed its request for re-
17 argument on February 25, 2020. As such, the Court
18 understands that the Debtor has timely sought the relief at
19 issue it's seeking in this matter.

20 Local Bankruptcy Rule 9023-1(a) imposes the same
21 standards as motions to alter or amend judgments under Rule
22 59(e). See *In re Best Payphones, Inc.*, 2016 WL 164900, at
23 *8 (Bankr. S.D.N.Y. 2016).

24 See also *Greenwald v. Orb Communications &*
25 *Marketing, Inc.*, 2003 WL 660844 at *1 (S.D.N.Y. Feb. 27,

1 2003) where the court noted that standards governing motions
2 to alter or amend judgments pursuant to Rule 59(e) and
3 motions for reconsideration or re-argument pursuant to Local
4 District Court Rule 6.3 are the same.

5 A court's consideration of a previous order "is an
6 extraordinary remedy to be employed sparingly in the
7 interest of finality and conservation of scarce judicial
8 resources." In re Health Management Services, Inc.
9 Securities Litigation, 113 F.Supp.2d 613,614 (S.D.N.Y.
10 1996).

11 In moving for reconsideration, the moving party
12 "must demonstrate that the court overlooked controlling
13 decisions of factual matters that were put before it on the
14 underlying motion." Eisemann v. Greene, 204 F.3d 393,395
15 n.2 (2d Cir. 2000) citation omitted.

16 See also In re Asia Global Crossing Limited, 332
17 B.R. 520,524 (Bankr. S.D.N.Y. 2005) where the court noted
18 that to succeed on a motion to reconsider, "the movant must
19 show that the court overlooked controlling decisions or
20 factual matters that might materially have influenced its
21 earlier decision."

22 See In re Handler, 324 B.R. 194,196 (Bankr.
23 E.D.N.Y. 2005), "In order to be successful, a motion to
24 alter or amend a judgment must show that the court
25 overlooked matters or controlling decisions which had they

1 been considered might reasonably have altered the result
2 reached by the court." Internal quotation marks omitted,
3 and in that the court cited to several cases in support of
4 that quotation.

5 The moving party may not advance new facts,
6 issues, or arguments not previously presented to the court.
7 Geneva Pharmacy Technological Corp v. Barr Labs, Inc., 2002
8 WL 133881*1 (S.D.N.Y. August 21, 2002), citation omitted.

9 See also In re Handler, 324 B.R. 196, "such a
10 motion may not be used to relitigate matters previously
11 determined or to raise a new legal theory or to present
12 evidence that could have been presented prior to the entry
13 of the judgment."

14 In the motion, the Debtor seeks reconsideration of
15 the stay relief order pursuant to Bankruptcy Rule 9023 and
16 Federal Rule 59 and reconsideration or vacating the stay
17 relief order pursuant to Bankruptcy Rule 9024 and Federal
18 Rule 60(b). Clarification of the stay relief order to
19 reflect the date the automatic stay terminated as to the
20 City and for determination that pursuant to this Section
21 362(e)(1) of the Bankruptcy Code as to the City of New York,
22 the automatic stay terminated automatically by operation of
23 law 30 days after October 16th, 2019, which is the date that
24 the Debtor filed the stay relief motion.

25 The Debtor seeks two forms of relief, and the

1 first form of relief as noted, the decretal paragraphs, in
2 the decretal paragraphs, the Court further ordered that the
3 automatic stay be and hereby is lifted and the City is
4 hereby authorized to transfer the deed to the Property to a
5 third party and that the period under the non-bankruptcy law
6 within which the City is authorized to transfer the deed is
7 hereby extended pursuant to 11 U.S.C. Section 108(c) to up
8 to 30 days from the entry of the order on the Court's
9 docket.

10 The Debtor requests reconsideration of the stay
11 relief order and that the stay relief order be amended or
12 vacated to remove those decretal paragraphs. The Debtor
13 says that the language in the order is improper because the
14 language makes a legal determination as to the right and
15 time with which the City had to transfer the property. IT
16 maintains that a motion for relief is a summary proceeding
17 and, therefore, the order should have only granted or denied
18 stay relief motion filed by the City.

19 The Court finds no merit in those contentions. In
20 the stay relief motion, the City sought relief from the stay
21 so that it could transfer the deed to the property and
22 complete the foreclosure action. Moreover, the City
23 asserted that if the stay is lifted, Section 108(c) applies
24 to extend the City's time to transfer the deed to the Villa
25 Property until the later of, one, the end of such period

1 including any suspension of such period occurring on or
2 after the commencement of the case, namely, 13 days or; two,
3 30 days after notice of determination or expiration of the
4 stay under Section 362.

5 The City contended that under the plain language
6 of Section 108(c)(2), it would have 30 days after it
7 receives notice of the stay termination to transfer the deed
8 to the Villa Property to the City or a third party selected
9 by HPD conveying full and complete title to the Villa
10 Property under Administration Code Section 11-412.1(b). The
11 Debtor did not challenge the timing of the request or
12 contend that it was improper for the Court to consider such
13 a request in the context of a stay hearing.

14 Indeed, the Debtor briefed the issue in opposing
15 the relief. The Court does not -- the Debtor does not
16 demonstrate that in resolving the issue of application of
17 Section 108(c) the Court overlooked controlling decisions or
18 factual matters that were put before it on the underlying
19 motion. Rather, the Debtor is advancing legal arguments not
20 previously presented to the Court. There's no basis --
21 there was no basis not to resolve the matter.

22 The Court denies the Debtor's request for the
23 first form of relief in the motion.

24 The second form of relief that the Debtor is
25 seeking is to clarify the date that the automatic stay

1 terminated and a determination as to whether Section 362(e)
2 of the Bankruptcy Code, whether with that, the automatic
3 stay terminated by operation of law 30 days after the stay
4 relief motion was filed by the City.

5 In relevant part, Section 362(e) of the Bankruptcy
6 Code states as follows:

7 "Thirty days after the request under (d) of this
8 section for relief from the stay of any act
9 against property of the estate under (a) of this
10 section, such stay is terminated with respect to
11 the party in interest making such request unless
12 the court after notice and a hearing orders such
13 stay continued, in effect, pending the conclusion
14 of or as a result of a final hearing and
15 determination under (d) of this section."

16 See 11 U.S.C. Section 362(e)(1). See also In re
17 Mullarkey, 536 F.3d 215,230 (3d Cir. 2008), "Section 362(e)
18 provides that a bankruptcy court must hold the preliminary
19 hearing on a motion to lift the stay within 30 days from the
20 date the motion is filed or the stay will be considered
21 lifted."

22 Briefly, in support of the second request, the
23 Debtor asserts as follows. October 16, 2019, which is the
24 motion filing date, is the date that the Debtor filed the
25 stay relief motion. November 15, 2019 is the day that is 30

1 days after October 16, 2019. December 4, 2019, which was
2 the motion initial hearing date, is the date of the initial
3 hearing on the stay relief motion.

4 The motion initial hearing date was more than 30
5 days after the motion filing date. As a consequence,
6 pursuant to Section 362(e) of the Bankruptcy Code, the
7 automatic stay terminated as to the City 30 days after the
8 stay relief motion was filed, that is on November 15, 2019,
9 which the stay relief motion was pending, thereby, rendering
10 the stay order a nullity.

11 As of November 15, 2019, the date that is 30 days
12 after the motion filing date, the City had no more than 30
13 days to transfer the Property in compliance with the third-
14 party transfer program. The City failed to transfer the
15 Property within this time period and, therefore, must
16 abandon any plans to transfer the Property and revert the
17 Property back to its shareholders.

18 If a determination is made that pursuant to
19 Section 362(e)(1) of the Bankruptcy Code the bankruptcy
20 estate terminated by operation of law on November 15, 2019,
21 then pursuant to Section 11-412.1(i) of the New York City
22 Administrative Code, the time for the City to transfer the
23 Property expired and the City is required to vacate the
24 Judgment of Foreclosure and dismiss the in-rem foreclosure
25 action against the Property, thereby providing the Debtor

1 with an absolute right to pay off past due tax amounts.

2 At no time during the pendency of the stay relief
3 motion did the Debtor contend that the automatic stay
4 terminated as a matter of law on November 15, 2019 or
5 otherwise, and that under the third-party transfer program,
6 the City had no more than 30 days from that date to transfer
7 the Property to be in compliance with that program. The
8 Debtor is barred from raising that issue now.

9 First, the case law is clear that a movant waives
10 the right to have its request for a stay determined within
11 the time periods set forth in Section 362(e) where the
12 movant's request for stay relief is pleaded in the
13 alternative or in addition to other relief requested in the
14 same motion, especially when the request for alternate
15 relief is not subject to time constraints.

16 See *In re Garsal Realty, Inc.*, 98 B.R. 140,157 *9
17 (Bankr. N.D.N.Y. 1989), "The court takes the position that
18 the movant waives the expedited time frame provided by
19 Section 362(e) when, as here, it requests separate relief in
20 addition to relief from the automatic stay."

21 *In re Alderson*, 144 B.R. 332 (Bankr. W.D.La.
22 1992). The request for relief -- a motion -- a request for
23 relief -- the movant's request for relief in addition to
24 stay relief results in a waiver of the time period set forth
25 in Section 362(e).

1 In re Small, 38 B.R. 143 (Bankr. D. Md. 1984).
2 The court noted that Section 362(e) does not apply where the
3 moving party requests adequate protection in addition to
4 relief from the automatic stay.

5 The alternative relief motion sought an order
6 either dismissing the case as having been filed in bad faith
7 or granting the City stay relief. The request to dismiss
8 the case is not subject to time constraints. Accordingly,
9 the Court finds that 362(e) is not applicable in this
10 matter.

11 Second, Section 362(e) of the Bankruptcy Code was
12 enacted to protect creditors. The legislative history
13 highlights Congress's intent: "(e) provides a protection for
14 secured creditors that is not available under present law.
15 The subsection sets a time certain within which the
16 bankruptcy court must rule on the adequacy of protection
17 provided of the secured creditor's interest."

18 It's a House of Representative Report Number 95-
19 595. 95th Congress First Session 344 (1977-1978) U.S. Code
20 Congressional and Administrative News 5963-6300.

21 As the Fourth Circuit noted, "Section 362(e) was
22 enacted to prevent the practice under the old bankruptcy act
23 of injunction by a continuance." Grundy National Bank v.
24 Virginia Bankers Association, that's In re Looney, 823 F.2d
25 788,792 (4th Cir. 1987).

1 It is well settled that a creditor can waive the
2 protections afforded by Section 362(e) either expressly or
3 implicitly. Courts routinely find implicit waivers of the
4 protections afforded by Section 362(e) where the creditor
5 takes some action which is inherently inconsistent with
6 adherence to the time constraints of Section 362(e).

7 Accordingly, "when a creditor agrees to or fails
8 to oppose a hearing that is inconsistent with the adherence
9 to the time constraints of Section 362(e), it results in an
10 implicit waiver of the statutorily granted rights of Section
11 362(e)." In re King, 2013 WL 5723325*4 (Bankr. S.D.Tex.
12 2013)

13 For example, in Bugg v. Gray, In re Gray, 519 B.R.
14 767,772, (BAP 8th Cir. 2014), which is a case relied on by
15 the Debtor, the court cites the cases from various
16 jurisdictions finding implicit waivers of the time
17 constraints set forth in Section 362(e) where actions are
18 taken that are inherently inconsistent with adherence to
19 such time constraints.

20 An example of those cases include: In re Ramos,
21 357 B.R. 669,663 n.2 (Bankr. S.D.Fl. 2016); Eisenburg v.
22 Exchange National Bank and Trust Company of Chicago, In re
23 Wilmette Partners, 34 B.R. 958,961 (Bankr. N.D. Ill. 1983);
24 Small v. Barkley Properties, In re Small, 34 B.R. 143,147
25 (Bankr. D.Md. 1984); In re McNeely, 51 B.R. 816,821 (Bankr.

1 D.Utah 1985); J.H. Striker and Company, Inc., v. Seaside Co,
2 Limited, In re Seaside Co, Limited, 155 B.R. 112,117
3 (E.D.Pa. 1993); and In re Aulicino, 400 B.R. 175 (Bankr.
4 E.D.Pa. 2008).

5 Here, even if the limitations under Section 363
6 were applicable, which the Court has found they are not, the
7 Debtor waived enforcement of the period by without
8 limitation, one, not raising the issue on the return date of
9 the motion; consenting to extensions of the briefing
10 schedules; and taking positions in the state court
11 litigation where it was acknowledging the existence of the
12 automatic stay.

13 Finally, under Section 105(a) of the Bankruptcy
14 Code, this Court has broad powers to administer a Chapter 11
15 case and take whatever action is appropriate or necessary in
16 aid of the exercise of its jurisdiction. See Casse v. Key
17 Bank National Association, In re Casse, 198 F.3d 327,336
18 (2d.Cir. 1999); In re Calder, 973 F.2d 862 (10thCir. 1992).

19 The City argues that the Court issued minute
20 orders, some of which required further briefing and
21 scheduling of additional hearings extending by implication
22 the 30-day period set forth in the Local Bankruptcy Rule
23 4001-1(a). The powers conferred by Section 105(a) are
24 unambiguously broad.

25 Even if the automatic stay terminated as of

1 November 15, pursuant to this Court's authority under
2 Section 105 and based on the record of the lift-stay motion,
3 the Court would reimpose the stay effective November 15
4 subject to the Court's determination of the stay relief
5 request in February.

6 Based upon the foregoing, the Court respectfully
7 denies the request for re-argument, and it adheres to its
8 opinion and resolution of the stay relief motion.

9 Thank you all very much.

10 MR. HIGGS: Thank you, Your Honor.

11 (Whereupon these proceedings were concluded at

12 5:51 PM)
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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski
Hyde

Digitally signed by Sonya Ledanski Hyde
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Sonya Ledanski Hyde

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Date: March 5, 2021

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